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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 25, Original.

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THE STATE OF KANSAS, COMPLAINANT,

vs.

THE UNITED STATES ET AL., DEFENDANTS.

ANSWER TO SUGGESTIONS SUBMITTED IN OPPOSITION TO MOTION FOR LEAVE TO FILE.

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I.

SUBJECT-MATTER.

Treating the facts pleaded according to their legal effect, it is obvious the bill states a justiciable case. The State of Kansas asserts that, by certain acts of Congress therein set forth, lands were granted by the United States to the State as trustee to aid construction of a railroad through the Indian Territory; that the road was seasonably built, the condition subsequent of the grant fully performed, and the grant of lands thereby fully earned; that thereafter, under authority of certain acts of Congress and agreements with the Creek Nation or tribe therein set forth, the common or tribal Indian

title *and* the ultimate title in fee hitherto held by the United States and so granted to the State were sought to be merged into individual ownership of the *entire* allodium or fee title by allotment and conveyance to separate individual members of the tribe in specific, separate tracts, resulting in legal effect in the *extinction* of the common tribal possession or occupancy, whereby the full right of possession is joined to the fee title so originally transferred to the State as such trustee. The prayer for relief is in the alternative (1) for decree establishing such perfect title as embracing all elements of the entire title in fee, or (2) decree for the money value of the property as against the United States for such breach of the original contract between the sovereigns.

PARTIES.

The State, as trustee, is properly party plaintiff. Her beneficiary need not be joined. The rule in that regard is elementary.

The bill is presented by the attorney general of the State, whose authority to thus appear and so act is implied by reason of his official position and consequent power, as this court has expressly so recognized the power of the attorney general to file bills for relief on behalf of the United States in

> *United States vs. San Jacinto Tin Co.,* 125 U. S., 273, 279-284.

But in point of fact this bill is presented by the direct authority of the chief executive of the State, as appears by his original written direction to that end, herewith submitted, and which reads as follows:

> "Whereas the Missouri, Kansas & Texas Railway Company had made application for an order to bring

the necessary suit or suits to test the rights of the State to recover the lands mentioned in said application, which said lands are the lands included in land grants to the State of Kansas as trustee for said railway company under certain acts of Congress, and accepted by acts of the legislature of said State; and

"Whereas it appears that in justice to all parties who may claim any interest in lands included in said grants such suit or suits should be brought at the earliest possible moment and the rights of all determined:

"Therefore it is ordered that said application is hereby granted and the attorney general, in connection with counsel provided by said railway company, are hereby authorized and directed to institute the necessary suit or suits to test the rights of the State to recover the lands mentioned in said application through the Indian Territory, the State to be fully indemnified and protected by said railway company from all costs and expenses of litigation, including attorneys' fees."

And the authority of the governor is clear under General Statutes of Kansas, 1901, which provides:

"SECTION 7271, DUTIES.—SEC. 71. The attorney "general shall appear for the State, and prosecute and "defend all actions and proceedings, civil or criminal, "in the supreme court, in which the State shall be "interested or a party, and shall also, when required "by the governor or either branch of the legislature, "appear for the State and prosecute or defend, in any "other court, or before any officer, in any cause or "matter, civil or criminal, in which this State may be "a party or interested."

The parties defendant are the United States, its administrative officers charged with the duty of executing the laws

relating to the Indians and their affairs, the Creek Nation and its principal chief, certain Creek Indians as allottees of the lands, certain named citizens of the States of Texas, Illinois, and Missouri as grantees under such original allotments, "and all other allottees of land in the Muskogee or Creek "Nation whose allotments in whole or in part are included "within every alternate section of land or parts thereof "designated by odd numbers to the extent of ten sections per "mile on each side of the Missouri, Kansas and Texas rail-"way and within twenty miles of the line of said road, and "all persons holding under said allottees or any of them."

II.

JURISDICTION.

This case is clearly within Federal judicial cognizance as one in equity "arising under this Constitution, the laws "of the United States, and treaties made * * * under "their authority."

Art. III, sec. 2.

Hence by reason of the *subject-matter* the Federal judicial power extends thereto.

The sovereign State is here party plaintiff. Upon the authority of *United States vs. Texas* (143 U. S., 621) and *United States vs. Michigan* (190 U. S., 379) we submit this suit of the State of Kansas against the United States can be maintained in this court under the original jurisdiction clause of the Constitution. The Texas and Michigan cases were suits brought by the United States against those States respectively. The suit now sought to be commenced by the

State of Kansas is the converse, the only difference being that the State is plaintiff and the United States defendant.

The doctrine of the Texas case, and likewise that of the Michigan case, is that the rule that the Government cannot be sued without its consent does not apply to suits between sovereigns.

The Texas case declares (p. 645) the broad ground that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," but immediately adds:

> "The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments,'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,' *McCulloch v. State of Maryland,* 4 Wheat., 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties, (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States,) and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, 'in

> which a State shall be a party,' without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States."

The fundamental basis for this conclusion is that in *this court* controversies between sovereigns—Federal or State—involving justiciable cause stand for original hearing and judgment in this court.

The Constitution does not in express terms confer upon the United States the power to thus appear as party plaintiff in an original suit in this court against a State. And the dissenting opinion in the Texas case (p. 649) stands broadly upon the express letter of the Constitution in this regard.

When, then, the Constitution is interpreted to confer this right of original action upon the United States, the reasoning which leads to that result manifestly applies in present instance; for in the Texas case the opinion cites with approval the observations of Mr. Justice Story, declaring the sovereign right of the United States to sue in its own courts and denying that such rights must be enforced in the State tribunals.

Indeed, the opinion in the Texas case adds the pertinent suggestion that if the rule were otherwise the United States must therefore sue in one of the courts of Texas. Hence,

upon the very theory of the decision in the Texas case, it is manifest that Kansas, having a justiciable case against the United States, and the Constitution conferring original jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States "in which a State shall be a "party," must of necessity include all cases of such Federal nature wherein the State has justiciable interest. Otherwise the State would be wholly without remedy. If the United States had not sought judicial determination of the controversy with the State of Texas, the State would, in such view, have been without judicial remedy, for the United States would not be suable by the State.

The principle is admirably reasoned in the Texas case. That immunity from suit by the sovereign, except with its consent, applies only in respect of individuals and not to controversies between the sovereigns leads, *ex necessitate,* to the conclusion that in all controversies of a Federal nature, wherein the State is a party, original suit may be brought in this court, summoning to its bar the United States, precisely as under converse conditions the United States may thus summon in the sovereign State.

In other words, the interpretation of the Constitution, which opens the door of original jurisdiction in this court to the United States against the State, must equally operate under converse conditions, or equality of sovereignty in this regard disappears.

The Constitution of the United States is the Constitution of all the States speaking in a united sense, and this court, as the Supreme Court of the United States, is also, in the same sense, the Supreme Court for all the United States, having original jurisdiction in all cases of Federal cognizance "in

which a State shall be a party." The language of the Constitution in this respect is broad and unqualified. Hence, we submit, the door does not here open to the United States against the State and close against the State when the United States is sought to be made defendant.

It is well settled that the sovereignty of the State within its sphere is of the same quality and absolutely equal with the sovereignty of the United States within its sphere. The grant of judicial power under the Constitution extends "to controversies to which the United States shall be a party; to controversies between two or more States," and likewise provides that "in all cases * * * in which a State shall be a party, the Supreme Court shall have original jurisdiction."

A construction of this great instrument which permits the United States to sue a State in this court ought not, we submit, upon plain principle, to be narrowed in order to *exclude* the State, under like conditions, from invoking the same jurisdiction.

Moreover, if the element of express consent by the United States to be thus sued is essential, it may be forcibly suggested that such consent has been given to individuals to thus sue the United States in all cases at law, in equity, or admiralty, not sounding in tort, by the act of March 3, 1887 (24 Stats., p. 505).

The mere circumstance that such suits may be brought in the Court of Claims or, within restricted jurisdictional amounts, in the circuit and district courts does not, we submit, alter the ultimate *fact* that the United States has recognized the principle that in all cases *ex contractu* it may be thus sued. Can it hence be properly said that a State must be driven to these inferior tribunals as party plaintiff against

the United States in the presence of the provision of the Constitution which declares that, in all cases of Federal connizance wherein the State is a party, original suit may be brought in this court? To so rule is to declare that the sovereignty of the State in such a case ranks only with the privilege of the private individual in all suits against the United States. On principle, and with manifest propriety, it may well be urged that recognition of the obligation of the United States to respond as defendant in suits *ex contractu* may well be held to include the suit of the sovereign State in this court where money recovery is so sought in the alternative.

We are well aware of the decision recently rendered in No. 16, original, of present term—the State of Oregon *vs.* Hitchcock, Secretary of the Interior, and Richards, Commissioner of the General Land Office—wherein, upon demurrer, the bill was dismissed. But we submit the decision therein is not here in point, because:

(1.) The only defendants in that case were the United States officials, whereas the Indians were necessary parties, and the decision so holds.

(2.) The bill sought injunctive relief in preventing transfer of the title of the United States to Indian allottees in respect of lands claimed by the State under a prior grant. No money relief was asked, whereas in the present case, in final analysis, the alternative relief here sought against the United States is a money decree if the primary prayer of the bill establishing title in the State is denied.

(3.) In the Oregon case the title to the land was and is still in the United States, and the decision clearly holds that this court will not interfere while the executive branch of the Gov-

ernment is administering the matter—a doctrine fully settled by many prior and cited cases.

The suggestion that the original jurisdiction of this court in respect of suits "in which a State shall be a party" is further limited also to suits where another State is defendant or citizens of another State are defendants is not applicable here, because:

(1.) The jurisdiction arises by reason of subject-matter, as we submit has been clearly shown *supra*.

(2.) Parties are made defendants by the bill, not officers of the United States nor residents of the Indian Territory, but citizens of the States of Texas, Illinois, and Missouri, who are sued by name and as grantees of specific Indian allottees (bill, pp. 2, 14, 15).

Hence the suit is one between the State as plaintiff and citizens of *other* States as defendants.

The brief submitted in behalf of the United States in opposition suggests that the State of Kansas has no substantial interest in the subject-matter and is but nominal complainant, the real party in interest being the railway company, and that "by the terms of the granting act the legal title passed to the "railroad company, if at all, upon the construction of the "road." This contention is based upon section 3 of such granting acts, which provide that as construction of each section of road is certified by the governor of the State patents shall issue to the company for "the land herein granted "within the limits above named."

The cases cited to support such contention demonstrate the *exact contrary*. The grant was to the State "for the use and

"benefit" of the company named therein. *The legal title hence passed to the State,* for under precisely similar state of facts this court, in *Van Wyck vs. Knevals,* 106 U. S., 360, 364, so held as follows:

> "The grant is similar in its main features to "numerous other grants of land made by Congress in "aid of railroads, and contains the same limitations, "or, rather, exceptions to it. It differs from some of "the grants in that it is made to the State, and not "directly to the company to be benefited. The act of "Congress, however, provides, notwithstanding the "designation of the State as grantee, that patents for "the land shall be issued directly to the company "upon the completion of every ten consecutive miles "of the road. The grant is of ten alternate sections, "designated by odd numbers, on each side of the "proposed road, subject to the condition that if it "appear, when the route of the road is 'definitely "'fixed,' that the United States have sold any section "or a part thereof, or the right of pre-emption or "homestead settlement has attached, or the same has "been reserved by the United States for any purpose, "the Secretary of the Interior shall cause an equal "quantity of other lands to be selected from odd sec- "tions nearest those designated, in lieu of the lands "appropriated, which shall be held by the State for "the same purpose. The grant is one *in præsenti,* "except as its operation is affected by that condition; "that is, it imports the transfer, subject to the limita- "tions mentioned, of a present interest in the lands "designated. The difficulty in immediately giving "full operation to it arises from the fact that the "sections designated as granted are incapable of iden- "tification until the route of the road is 'definitely "'fixed.' When that route is thus established the "grant takes effect upon the sections by relation as of

"the date of the act of Congress. In that sense we say "that the grant is one *in præsenti*. It cuts off all "claims, other than those mentioned, to any portion "of the lands from the date of the act, and passes the "title as fully as though the sections had then been "capable of identification. Nor is this operation of "the grant affected by the fact that patents of the "United States are subsequently, upon the certificate of "the governor, to be issued by the Secretary of the "Interior directly to the company and not to the "State. This is only a mode of divesting the State of "her trust character and of passing the legal title held "by her to the party for whose benefit the grant was "made. The legal title under the grant goes to the "State, but the equitable right vests in the company. "The State cannot dispose of the lands; she simply "holds them for the use and benefit of the company, "the act of Congress providing how her trust shall be "discharged and the legal title be conveyed to the "company."

No patent has issued to the railway company, and hence *the legal title* conveyed by the granting act to the State still remains in the State. The State of Kansas is hence the indispensable party complainant and can alone pray the demanded relief.

The case of *Van Wyck vs. Knevals, supra,* is thus direct authority in favor of the proposition that the title to the granted lands is vested in the State of Kansas, for the land grant there construed is in practically the same words as sections 1 and 3 of the land grant of 1866 to the State of Kansas for the use of the M., K. & T. Railway Company. But an examination of the statute will show that the provisions of the law by which the patents were to be issued directly to the company upon certificates of the governor of Kansas have no application to the lands in the Indian Territory.

Section 1 of the act relates only to lands in Kansas. Section 3 provides that when the governor of Kansas shall certify that any section of ten consecutive miles of the road is completed the Secretary of the Interior shall issue to the company patents for so many sections of the land granted within the limits "above named" that is within the limits named in section 1.

Section 9 provides that the "same grant of lands through the Indian Territory are hereby made as provided *in the first section of this act,* whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided,* That said lands become a part of the public lands of the United States." Nothing is said in the ninth section about the third section.

By section 8 of the act the right of way through the Indian Territory is granted directly to the railway company; but by section 9 the lands are granted (as in section 1 thereof) to the State of Kansas for the purpose of aiding the railway company.

It is manifest that the Secretary of the Interior could not "issue patents to the company" for lands in the Indian Territory merely upon the certificate of the governor of Kansas that ten miles of road had been completed in the Indian Territory. It would be necessary for the Secretary to be informed not only of the fact of completion of the ten miles, but of the extinguishment of the Indian title. As the provisions of section 3 are absolute and unconditional, they cannot reasonably be considered to relate to the grant contained in section 9.

Moreover, it is plain, from an examination of the entire act, that Congress, when it enacted section 3, had in mind mainly the lands situated in the State of Kansas.

Section 11 of the act of July 25, 1866 (bill, p. 27), shows that the railroad was to be built through the Indian Territory upon and after obtaining the written approval of the President of the United States, and that the company, having so commenced the work through the Indian Territory, should prosecute the same in good faith so as to insure its completion through the Territory within a reasonable time, subject to the approval of the President of the United States.

The Department of the Interior, with respect to the lands in the Indian Territory, would, before issuing patents, have required not only evidence of the completion of the road and the fact of the extinguishment of the Indian title, but also the authority of the State of Kansas, by legislation or otherwise, to issue patents to the railway company.

The other cases cited on opposing brief contain nothing to the contrary of the rule so clearly expresed in *Van Wyck vs. Knevals.*

As holder of such legal title in trust for the company, the State has both interest and obligation to thus proceed in protection of the rights of her *cestui que trust.* That the railway company has asserted its rights before various executive officers without the intervention of the State is unimportant here. When resort to judicial relief is compelled and the basis therefor is the enforcement or recognition of the *legal title,* the holder of such legal title is the indispensable complainant. For that plain proposition citation of authority is needless here.

In *U. S. vs. Michigan,* 190 U. S., 379, this court sustained a bill by the United States to enforce a trust created in the State by a grant from Congress made in aid of the construction of a ship canal. As the State of Michigan was held to be accountable as a trustee, it follows that as a trustee it could

maintain a suit in aid of its trust. The rights and obligations must be reciprocal. The State of Kansas was created a trustee by the land-grant act of 1866, chargeable with the obligations of a trustee, and therefore possessing the rights of a trustee in regard to the trust property. She was not a mere "collecting agent," but a trustee in whom the legal title was vested, with full power to institute any and all proceedings necessary to preserve and to maintain that title.

The object of the land grant was to serve purposes of both the United States and the State of Kansas, to open lines of railroad connecting distant parts of the country and to develop and upbuild the country and serve the cause of an advancing civilization. The State is in no sense an intruding volunteer. Nor is the matter in any manner affected by the circumstance that the *cestui que trust* is obligated to indemnify the State for the cost of the proceeding. A trustee holding thus is entitled to be so indemnified by the beneficiary. That is matter of common practice and manifest propriety, in no manner affecting the legal duty of the trustee nor in any possible view affecting the jurisdiction of the court to hear and determine the cause.

The case of *New Hampshire vs. Louisiana,* 108 U. S., 76, cited on opposing brief, is not applicable here. There, by general statute, the State had invited its citizens holding obligations against other States to assign them to the State, and upon deposit of estimated cost of the litigation the attorney general of such assignee State was authorized to bring suit in the name of the State in this court against the debtor State. The purpose of such proceeding was clearly to avoid the effect of the eleventh amendment to the Constitution. The State in such instance had no original interest in the subject-matter, had assumed no original duty as trustee, and

was in no sense an original party to the controversy. The distinction between the case thus cited and the present is so manifest that further comment is unnecessary.

III.

The suggestion that "it does not appear that all the lands "in controversy have been allotted" is not correct. The bill (pp. 12, 13, and especially 16) shows that "generally speak-"ing all lands within twenty miles of the Missouri, Kansas "and Texas railway *have been allotted.*" It is because of such allotments (which have been practically completed) and the attempted transfer to such allottees of the title of the United States, notwithstanding the prior grant of the same lands to the State, that this bill is now presented. The suggestion of the attorney general would compel a separate suit in respect of each actual allotment, a proceeding condemned by settled equity practice, whereas the bill is presented upon the obvious theory that the United States has in legal effect *accomplished* the wrong complained of and wherefrom relief is sought. Refusal to entertain the cause upon such an objection would, we submit, be most inequitable. Otherwise the State could not present its single bill until the last individual allotment had been made. That could be deferred indefinitely, and when accomplished the plea of laches against the State would as obviously be then interposed. This cause is too important in every view and upon all sides to be now withheld from judgment upon such a strained suggestion.

The final suggestion of opposing brief is directed solely to the *merits* of the cause. No present answer is required. The grave questions involved in this controversy cannot be thus settled in fifteen lines of mere suggestion which ignores all discussion of the meaning and effect of the original grant

in præsenti to the State, since fully and seasonably earned, and all reference to the legal effect of the efforts of the grantor to thereafter repudiate the grant and deliberately avoid the contract. Certainly against such wrongs and upon the full recital of all the facts as set forth in the bill the judicial power vested under the Constitution in this court to hear and determine the controversy constitutes the very essence of due process of law. From that inquiry the United States should not shrink nor, we submit, interpose objections which seek to deny all judicial inquiry or remedy here or elsewhere.

There are assumptions in the brief of counsel for the United States which we do not deem it necessary to notice, such as that the State of Kansas has no interest in the subject-matter of this suit and was not interested in the construction of the railroad beyond her boundaries. She was interested in having her railroad connect her with the Indian Territory, Texas, the Gulf of Mexico, and the Republic of Mexico, and she is vitally interested in seeing that justice is done the corporation promoted and organized under her laws and which is one of her citizens, and that her trust obligations under the acts of Congress are enforced for her beneficiaries.

Respectfully submitted.

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